

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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DAVID BOLLINGER,

Petitioner,

v.

RENEE BAKER, et al.,

Respondents.

Case No. 2:98-cv-01263-MMD-PAL

ORDER

I. INTRODUCTION

This action is a petition for a writ of habeas corpus by David Bollinger, a Nevada prisoner sentenced to death. There are, before the Court, motions to dismiss Bollinger's third amended habeas corpus petition and for partial summary judgment. In this order, the Court resolves those motions, granting the motion to dismiss in part and denying it in part, and denying the motion for summary judgment.

II. BACKGROUND FACTS AND PROCEDURAL HISTORY

The following is from the Nevada Supreme Court's August 24, 1995, opinion on Bollinger's direct appeal:

David A. Bollinger ("Bollinger") was convicted of two counts of murder in the first degree for killing Rose and James Vertrees ("the Vertreeses"), two counts of kidnapping, two counts of robbery, and one count of burglary. Bollinger, and possibly an accomplice identified as Tom Johnston ("Johnston"), robbed the Vertreeses in their motor home in Reno. After beating the Vertreeses to death, Bollinger, or he and Johnston, set fire to the Vertreeses' bodies at a rest-stop in Rifle, Colorado. [Footnote: Johnston's name came up occasionally at trial. Although this shadowy character may have participated in the crimes, the State suggested that possibly only Bollinger committed the crimes.

1 Indeed, police officers never found Johnston or proof of his existence.]
 2 After being arrested in Colorado, Bollinger placed a tattoo on his shoulder
 which read "Pyro," the nickname inmates had given him.

3 After empaneling a jury, the district court admonished jurors,
 4 pursuant to NRS 175.401, to refrain from talking about the trial and to
 avoid coming into contact with the media. During trial, however, the district
 5 court often failed to admonish the jury before adjourning. At the conclusion
 of the trial, the district court issued the following instruction based upon
 the statutory definition of reasonable doubt:

6 * * *

7 With respect to Rose's murder, the jury found Bollinger worthy of
 8 death. In support of this finding, the jury found no mitigating factors but
 selected all three possible aggravating factors: (1) Bollinger was under
 9 sentence of imprisonment at the time, (2) Bollinger committed the crime
 while engaged in or in flight from a robbery, burglary, or kidnapping, and
 10 (3) the murder was committed to avoid lawful arrest.

11 With respect to James' murder, the jury found that Bollinger should
 be imprisoned for life without the possibility of parole. In support of this
 12 finding, the jury found the following two mitigating factors: (1) Bollinger had
 no significant criminal history, and (2) "other mitigating circumstance"
 13 existed. In addition, the jury did not select any of the three possible
 aggravating factors that it selected regarding Rose's murder.

14
 15 *Bollinger v. State*, 111 Nev. 1110, 1112-14, 901 P.2d 671, 672-74 (1995).

16 The Nevada Supreme Court affirmed the judgment of conviction and death
 17 sentence on August 24, 1995. *Bollinger*, 111 Nev. at 1117, 705 P.2d at 676.

18 Bollinger filed his first state court habeas corpus petition on September 12, 1996.
 19 Exhibit 263 (dkt. no. 196-1).¹ The state district court held an evidentiary hearing on
 20 March 3 and 4, 1997. Exhibits 267, 281 (dkt. nos. 197, 197-1, 199-1). The petition was
 21 denied on May 7, 1997. Exhibit 270 (dkt. no. 198).

22 Bollinger appealed. Exhibits H, I, J (dkt. no. 217). The Nevada Supreme Court
 23 dismissed the appeal on July 28, 1998. Exhibit K (dkt. no. 217).

24 Bollinger then initiated this federal habeas corpus action on September 9, 1998.
 25 Counsel was appointed, discovery proceedings ensued, and a first amended habeas

26 ¹Exhibits identified by number (*E.g.* "Exhibit 1") are located in the record at dkt.
 27 nos. 169-208, and 226. Exhibits identified by letter (*E.g.* "Exhibit A") are located in the
 28 record at dkt. no. 217. Citations to the location of exhibits in the record are provided, in
 parentheses.

1 petition (dkt. no. 39) was filed on February 29, 2000. After extensive discovery
2 proceedings, Bollinger filed a second amended habeas petition (dkt. no. 110) on
3 October 29, 2004. On June 22, 2005, respondents filed a motion to dismiss and motion
4 for summary judgment (dkt. nos. 124, 125, 126), asserting that several claims in the
5 second amended petition were not exhausted in state court. Then, on October 5, 2005,
6 the parties submitted a stipulation to stay the case pending Bollinger's exhaustion of
7 claims in state court (dkt. no. 130). The Court approved that stipulation, and stayed this
8 action on October 13, 2005 (dkt. no. 130).

9 On November 14, 2005, Bollinger filed a second state habeas petition. Exhibit
10 273 (dkt. nos. 198-1, 198-2, 198-3). The State moved to dismiss. Exhibit 283 (dkt. no.
11 199-2). The state district court dismissed the petition on October 10, 2007. Exhibit 290
12 (dkt. no. 199-3). Bollinger appealed. Exhibits 292, 293, 294 (dkt. nos. 199-4 - 200). The
13 Nevada Supreme Court affirmed the state district court's ruling on September 20, 2011.
14 Exhibit 295 (dkt. no. 201). Rehearing was denied on December 20, 2011. Exhibit 297
15 (dkt. no. 201).

16 On March 12, 2012, the stay of this federal habeas action was lifted (dkt. no.
17 152). On September 14, 2012, Bollinger filed a third amended habeas petition (dkt. no.
18 168), which is now the operative petition in this case.²

19 On March 12, 2013, respondents filed their motions to dismiss and for partial
20 summary judgment (dkt. nos. 215, 216).³ Bollinger filed an opposition to those motions
21 on September 12, 2013 (dkt. no. 225). Respondents replied on November 27, 2013
22 (dkt. no. 231).

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24 ²The claims referenced in this order are the claims asserted in the third amended
25 habeas petition, unless otherwise stated.

26 ³Respondents' motions to dismiss and for partial summary judgment are
27 contained in one document. That document was filed and docketed twice, reflecting that
28 it includes both a motion to dismiss and a motion for summary judgment. In this order,
the Court cites the document containing respondents' motions as "Motions to Dismiss
and for Partial Summary Judgment (dkt. nos. 215, 216)."

1 In their motions, respondents raise four main arguments: (1) several claims in
2 Bollinger's third amended petition are unexhausted in state court, (2) several claims are
3 procedurally defaulted, (3) several claims fail to state a cognizable claim for federal
4 habeas corpus relief, and (4) several claims were waived in Bollinger's state court
5 proceedings.

6 **III. EXHAUSTION**

7 Respondents argue that all the claims in Bollinger's third amended petition
8 except Claim 14F are unexhausted in state court. See Motions to Dismiss and for
9 Partial Summary Judgment (dkt. nos. 215, 216), pp. 29-33. Bollinger argues, in
10 response, that he has exhausted all his claims. See Opposition to Motions to Dismiss
11 and for Partial Summary Judgment (dkt no. 225), p. 3. The Court finds that Bollinger has
12 exhausted in state court all the claims in his third amended petition. A federal court may
13 not grant habeas corpus relief on a claim not exhausted in state court. 28 U.S.C. §
14 2254(b). The exhaustion doctrine is based on the policy of federal-state comity, and is
15 intended to allow state courts the initial opportunity to correct constitutional deprivations.
16 See *Picard v. Conner*, 404 U.S. 270, 275 (1971). To exhaust a claim, a petitioner
17 generally must fairly present the claim to the highest state court, and must give that
18 court the opportunity to address and resolve it. See *Duncan v. Henry*, 513 U.S. 364, 365
19 (1995) (*per curiam*); *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 10 (1992).

20 Bollinger argues that part of Claim 7 was exhausted on his direct appeal.
21 Opposition to Motions to Dismiss and for Partial Summary Judgment, p. 2. Specifically,
22 Bollinger points to part of Claim 7 in which he claims that his federal constitutional rights
23 were violated because the trial judge was not impartial. See *id.*; see also Third
24 Amended Petition, pp. 127-34. In that part of Claim 7, Bollinger mentions, as indications
25 of the trial judge's bias, the judge's alleged failure to adequately admonish the jury
26 concerning news media coverage of the trial (Third Amended Petition, p. 132), and the
27 judge's alleged failure to exclude evidence concerning Bollinger's tattoo of the word
28 "Pyro" (Third Amended Petition, p. 133). Bollinger argues those parts of Claim 7 were

1 exhausted on his direct appeal. See Opposition to Motions to Dismiss and for Partial
2 Summary Judgment, p. 2. This argument is without merit. On his direct appeal, Bollinger
3 did not argue that the trial judge was biased, and, with regard to the issue of the judge's
4 admonishments regarding media coverage and the judge's admission of evidence of the
5 tattoo, Bollinger raised no federal constitutional issue. See Appellant's Opening Brief,
6 Exhibit 258 (dkt. no. 196), pp. 9-13, 20-22. Claim 7, therefore, was not exhausted on
7 Bollinger's direct appeal, but, as is discussed below, was one of the claims exhausted
8 only in Bollinger's second state habeas petition.

9 Claim 14F in Bollinger's third amended petition is a claim that the jury instruction
10 given by the trial court regarding "reasonable doubt" was unconstitutional. See Third
11 Amended Petition (dkt. no. 168), pp. 160-62. Bollinger exhausted that claim on his direct
12 appeal. See Appellant's Opening Brief, Exhibit 258 (dkt. no. 196), pp. 13-20.

13 Claim 18 is a claim that Bollinger's appellate counsel was ineffective. See Third
14 Amended Petition, pp. 195-98. Claim 18 includes a claim that Bollinger's appellate
15 counsel was ineffective for failing to raise the claims set forth in his third amended
16 petition in this action. See *id.* at 195. Claim 18 and Claim 2, therefore, when read
17 together, include a claim that Bollinger's appellate counsel was ineffective for failing to
18 raise a claim that the trial court did not have jurisdiction. See *id.* at 58-62. Bollinger
19 exhausted this claim in his first state habeas action. See Appellant's Opening Brief,
20 Exhibit H (dkt. no. 217-2), pp. 19-22.

21 Claim 18, when read together with Claim 2, also includes a claim that Bollinger's
22 appellate counsel was ineffective for failing to raise a claim that the transfer of
23 Bollinger's case from Colorado to Nevada resulted in a violation of Bollinger's right to a
24 speedy trial. See Third Amended Petition, pp. 63-64, 195-98. Bollinger exhausted this
25 claim, as well, in his first state habeas action. See Appellant's Opening Brief, Exhibit H
26 (dkt. no. 217-2), pp. 22-25.

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1 All the claims in Bollinger's third amended petition other than the claim regarding
2 the reasonable doubt instruction (Claim 14F) and the two claims of ineffective
3 assistance of appellate counsel described above (parts of Claim 18) were exhausted by
4 Bollinger only in his second state habeas action. See Petition for Writ of Habeas
5 Corpus, Exhibit 273 (dkt. nos. 198-1, 198-2, 198-3); see *also* Third Amended Petition,
6 pp. 5-7; Opposition to Motions to Dismiss and for Partial Summary Judgment, p. 3.

7 Respondents argue that these claims — the claims Bollinger raised only in his
8 second state habeas action — are not exhausted. See Motions to Dismiss and for Partial
9 Summary Judgment (dkt. nos. 215, 216), pp. 29-33. Respondents acknowledge that
10 Bollinger raised all the claims in his third amended petition in the state district court in
11 his second state habeas action, but argue that Bollinger abandoned all those claims on
12 appeal. See *id.* Respondents point out that, on the appeal in the second state habeas
13 action, the argument of the parties concerned procedural issues and the merits of
14 Bollinger's claims were not briefed. See *id.* In the second state habeas action, the
15 district court dismissed all Bollinger's claims on procedural grounds. See Order, Exhibit
16 290 (dkt. no. 199-3). On appeal, then, the argument of the parties naturally concerned
17 the procedural rulings of the state district court, and not the merits of the dismissed
18 claims. See Appellant's Opening Brief, Exhibit 292 (dkt. nos. 199-4, 199-5, 199-6, 199-
19 7). Under these circumstances, the claims that Bollinger raised in his second state
20 habeas action are exhausted, but, as is explained below, they are also procedurally
21 defaulted. Procedurally defaulted claims are exhausted; there is no further remedy
22 available in state court with respect to such claims. See *Cooper v. Neven*, 641 F.3d
23 322, 327 (9th Cir.2011), *cert. denied*, 132 S.Ct. 558 (2011) (finding that if state courts
24 will not hear a petitioner's claims on their merits because of failure to comply with a
25 state procedural rule, the claims are "technically exhausted" and procedurally
26 defaulted).

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IV. PROCEDURAL DEFAULT

A. Legal Standards

In *Coleman v. Thompson*, the Supreme Court held that a state prisoner who fails to comply with the state's procedural requirements in presenting his claims is barred from obtaining a writ of habeas corpus in federal court by the adequate and independent state ground doctrine. *Coleman v. Thompson*, 501 U.S. 722, 731–32 (1991) (“Just as in those cases in which a state prisoner fails to exhaust state remedies, a habeas petitioner who has failed to meet the State’s procedural requirements for presenting his federal claims has deprived the state courts of an opportunity to address those claims in the first instance.”). Where such a procedural default constitutes an adequate and independent state ground for denial of habeas corpus, the default may be excused only if “a constitutional violation has probably resulted in the conviction of one who is actually innocent,” or if the prisoner demonstrates cause for the default and prejudice resulting from it. *Murray v. Carrier*, 477 U.S. 478, 496 (1986).

To demonstrate cause for a procedural default, the petitioner must “show that some objective factor external to the defense impeded” his efforts to comply with the state procedural rule. *Murray*, 477 U.S. at 488. For cause to exist, the external impediment must have prevented the petitioner from raising the claim. See *McCleskey v. Zant*, 499 U.S. 467, 497 (1991). With respect to the prejudice prong, the petitioner bears “the burden of showing not merely that the errors [complained of] constituted a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire [proceeding] with errors of constitutional dimension.” *White v. Lewis*, 874 F.2d 599, 603 (9th Cir. 1989), citing *United States v. Frady*, 456 U.S. 152, 170 (1982).

As the court understands respondents’ argument, they assert that all the claims that Bollinger exhausted only in his second state habeas action — that is, all the claims in his third amended petition other than the claim regarding the reasonable doubt instruction (Claim 14F) and the two claims of ineffective assistance of appellate counsel

1 described above (part of Claim 18) (see discussion regarding exhaustion, *supra*) — are
2 procedurally defaulted and should be dismissed on that ground. See Motions to Dismiss
3 and for Partial Summary Judgment, pp. 33-44.

4 **B. The Procedural Default**

5 Bollinger presented all the claims that now appear in his third amended petition in
6 his second state habeas petition. See Petition for Writ of Habeas Corpus, Exhibit 273
7 (dkt. nos. 198-1, 198-2, 198-3); see *also* Third Amended Petition, pp. 5-7; Opposition to
8 Motions to Dismiss and for Partial Summary Judgment, p. 3. On October 10, 2007, the
9 state district court dismissed all Bollinger's claims on procedural grounds. See Order,
10 Exhibit 290 (dkt. no. 199-3). Bollinger appealed, and the Nevada Supreme Court
11 affirmed. Exhibits 292, 293, 294, 295, 297 (dkt. nos. 199-4 - 201). In doing so, the
12 Nevada Supreme Court addressed only Bollinger's procedural default, ruling that
13 Bollinger could not overcome the default; it did not address any of Bollinger's claims on
14 their merits. See *id.* Therefore, all the claims exhausted by Bollinger only in his second
15 state habeas action are subject to the procedural default doctrine.

16 This applies to all of Claims 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14A, 14B, 14C,
17 14D, 14E, 14G, 15, 16, 17, all of Claim 18 except the claims that Bollinger's appellate
18 counsel was ineffective for failing to raise a claim that the trial court did not have
19 jurisdiction and that Bollinger's appellate counsel was ineffective for failing to raise a
20 claim that the transfer of Bollinger's case from Colorado to Nevada resulted in a
21 violation of Bollinger's right to a speedy trial, and all of Claim 19. Those claims are
22 barred by the procedural default doctrine, unless Bollinger can show otherwise. Below,
23 the Court addresses the arguments of the parties with respect to the adequacy of the
24 state procedural rule to support the procedural default defense, and with respect to the
25 application of the procedural default defense to certain of Bollinger's claims.

26 **C. Adequacy of the State Procedural Rule**

27 A state procedural rule is "adequate" if it is "clear, consistently applied, and well-
28 established at the time of the petitioner's purported default." *Calderon v. United States*

1 *Dist. Court (Bean)*, 96 F.3d 1126, 1129 (9th Cir. 1996) (citation and internal quotation
2 marks omitted); *see also Ford v. Georgia*, 498 U.S. 411, 424 (1991) (State procedural
3 rule adequate if “firmly established and regularly followed by the time as of which it is to
4 be applied.” (citation and internal quotation marks omitted)); *Lambright v. Stewart*, 241
5 F.3d 1201, 1203 (9th Cir.2001).

6 In *Bennett v. Mueller*, 322 F.3d 573, 585-86 (9th Cir. 2003), the court of appeals
7 announced a burden-shifting test for analyzing adequacy. Under *Bennett*, the State
8 carries the initial burden of pleading “the existence of an independent and adequate
9 state procedural ground as an affirmative defense.” *Bennett*, 322 F.3d at 586. The
10 burden then shifts to the petitioner “to place that defense in issue,” which the petitioner
11 may do “by asserting specific factual allegations that demonstrate the inadequacy of the
12 state procedure, including citation to authority demonstrating inconsistent application of
13 the rule.” *Id.* If the petitioner meets this burden, “the ultimate burden” of proving the
14 adequacy of the procedural rule rests with the State, which must demonstrate “that the
15 state procedural rule has been regularly and consistently applied in habeas actions.”
16 *Id.*; *see also King v. Lamarque*, 464 F.3d 963, 966-67 (9th Cir. 2006).

17 In this case, respondents meet their initial burden under *Bennett* by asserting that
18 the Nevada Supreme Court’s application of NRS 34.726, the state-law one-year statute
19 of limitations for habeas actions, constituted an independent and adequate state
20 procedural ground for denying relief. *See* Motions to Dismiss and for Partial Summary
21 Judgment, pp. 33-44.⁴

22 In response, Bollinger challenges the adequacy of NRS 34.726. *See* Opposition
23 to Motions to Dismiss and for Partial Summary Judgment, pp. 20-26.

24 ⁴In asserting their procedural default argument, respondents do not appear to
25 rely on the state courts’ application of NRS 34.800 or 34.810. With respect to NRS
26 34.810 (successive petitions), this is presumably because the Ninth Circuit Court of
27 Appeals has held that statute to be inadequate to support the procedural default
28 defense in federal court. *See Valerio v. Crawford*, 306 F.3d 742, 777-78 (9th Cir. 2002).
At any rate, respondents meet their burden with respect to their assertion that NRS
34.726 constituted an independent and adequate bar to federal habeas review, and the
analysis proceeds with respect to the state courts’ application of that statute.

1 Bollinger's default occurred in 1996, one year after his direct appeal was
 2 concluded. The Ninth Circuit Court of Appeals has rejected the argument that the
 3 Nevada Supreme Court inconsistently applied NRS 34.726 at that time, and has held
 4 that it was then adequate to support a procedural bar. See *Loveland v. Hatcher*, 231
 5 F.3d 640, 642-63 (9th Cir. 2000) (regarding NRS 34.726, as of 1993); *Moran v.*
 6 *McDaniel*, 80 F.3d 1261, 1269-70 (9th Cir. 1996) (regarding NRS 34.726, as of 1996).
 7 Bollinger has not met his burden, to assert specific factual allegations that demonstrate
 8 the inadequacy of the state procedural rule. Bollinger has not asserted any argument,
 9 and has made no showing, to undermine the Ninth Circuit's ruling that NRS 34.726 was
 10 consistently applied, and adequate to support a procedural default, at the time of
 11 Bollinger's default in this case.

12 This Court, therefore, follows *Moran* and *Loveland*, and rules that NRS 34.726
 13 was adequate to support the procedural default defense asserted by respondents.

14 **D. Good Cause/Claims of Ineffective Assistance of Trial Counsel**

15 With respect to the procedural default of the claims of ineffective assistance of
 16 trial counsel that he raised in state court only in his second state habeas action,
 17 Bollinger argues, relying upon *Martinez v. Ryan*, ___ U.S. ___, 132 S.Ct. 1309, 182
 18 L.Ed.2d 272 (2012), that ineffective assistance of counsel in his first state habeas action
 19 constitutes cause for the procedural default. See Opposition to Motions to Dismiss and
 20 for Partial Summary Judgment, pp. 29-57.

21 In *Martinez*, the Supreme Court noted that it had previously held, in *Coleman v.*
 22 *Thompson*, 501 U.S. 722, 746-47 (1991), that "an attorney's negligence in a
 23 postconviction proceeding does not establish cause" to excuse procedural default.
 24 *Martinez*, 132 S.Ct. at 1319. The court in *Martinez* then "qualif[ied] *Coleman* by
 25 recognizing a narrow exception: inadequate assistance of counsel at initial-review
 26 collateral proceedings may establish cause for a prisoner's procedural default of a claim
 27 of ineffective assistance at trial." *Id.* at 1315. The court described "initial-review

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1 collateral proceedings” as “collateral proceedings which provide the first occasion to
2 raise a claim of ineffective assistance at trial.” *Id.*

3 In *Martinez*, the petitioner’s procedural default was based on an Arizona rule
4 barring successive petitions; as such, the petitioner’s procedural default was complete
5 when counsel in the initial-review collateral proceeding failed to raise certain claims.
6 See *Martinez*, 132 S.Ct. at 1314. The procedural default at issue in this case is different.
7 Bollinger’s procedural default is based on the statute of limitations in NRS § 34.726.
8 The procedural default occurred because Bollinger delayed for ten (10) years, after his
9 direct appeal ended in 1995, before he initiated his second state habeas action in 2005,
10 asserting the claims now held to be procedurally defaulted. See Order of Affirmance,
11 Exhibit 295, pp. 2-3. The attorney who represented Bollinger in his first state habeas
12 action represented Bollinger for only about two (2) years, while Bollinger’s first state
13 habeas action was pending, a relatively small portion of the time over which the statute
14 of limitations default occurred. Ineffective assistance of Bollinger’s first state post-
15 conviction counsel does not explain the ten-year delay that led to Bollinger’s default
16 under NRS § 34.726. In short, there is an insufficient causal connection between the
17 alleged ineffective assistance of Bollinger’s first post-conviction counsel and the
18 procedural default at issue in this case. Ineffective assistance of counsel in Bollinger’s
19 first state habeas action does not function as cause for the procedural default of the
20 claims of ineffective assistance of trial counsel raised in Bollinger’s second state habeas
21 action.

22 **E. Independence of the Nevada Supreme Court’s Ruling**

23 **i. Claim 4**

24 Claim 4 of Bollinger’s third amended petition is a claim based on *Polk v.*
25 *Sandoval*, 503 F.3d 903 (9th Cir.2007), and *Byford v. State*, 116 Nev. 215, 994 P.2d
26 700 (2000), that his constitutional rights were violated on account of the “trial court’s
27 failure to properly instruct the jury concerning the elements of the capital offense.” Third
28 Amended Petition, p. 67.

1 Bollinger argues that the Nevada Supreme Court's dismissal of the claim was not
2 a default ruling, but was a ruling on the merits, and, at any rate, to the extent that it was
3 a default ruling, it was inadequate. See Opposition to Motions to Dismiss and for Partial
4 Summary Judgment, pp. 6-16. Bollinger's argument is without merit.

5 First, the Nevada Supreme Court only addressed Bollinger's procedural default,
6 finding that the claim was procedurally defaulted, and that Bollinger did not make a
7 showing of good cause and prejudice to overcome that default. See Order of
8 Affirmance, Exhibit 295, p. 4 ("Therefore, the district court did not err in concluding that
9 Bollinger could not demonstrate good cause and prejudice to overcome the applicable
10 procedural bars with respect to this claim.").

11 Second, Bollinger's argument that the procedural rule is inadequate is foreclosed
12 by *Babb v. Lozowsky*, 719 F.3d 1019 (9th Cir.2013), in which the court of appeals ruled
13 that *Polk* was undermined by *Nika v. State*, 124 Nev. 1272, 198 P.3d 839, 849 (2008).
14 See *Babb*, 719 F.3d at 1027-28. The court in *Babb* explained:

15 According to *Nika*, this Court in *Polk* was wrong in concluding that the
16 *Kazalyn* instruction was a violation of due process because the instruction
17 accurately represented the elements of first degree murder up until *Byford*
18 was decided. Thus, before *Byford* was decided, the *Kazalyn* instruction did
not improperly relieve the State of the burden of proving all the elements
of first degree murder.

19 *Babb*, 719 F.3d at 1028. Bollinger's conviction became final long before *Byford* was
20 decided. Therefore, after *Babb*, there is no viable argument that the *Polk* decision gave
21 rise to any claim for relief for Bollinger. The Nevada cases cited by Bollinger, in an
22 attempt to show the procedural rule to be inadequate, predate the *Babb* decision. See
23 Opposition to Motions to Dismiss and for Partial Summary Judgment, pp. 14-15.
24 Bollinger makes no showing that the procedural bar was inadequate with respect to its
25 application to this claim.

26 Claim 4 is procedurally defaulted.

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1 **ii. Claim 5**

2 Claim 5 is a claim that Bollinger's constitutional rights were violated because of
3 ineffective assistance of his trial counsel. Third Amended Petition, pp. 74-119. Claim 5
4 includes several distinct sub-claims. *See id.*

5 Bollinger points out that he attempted in state court to overcome the procedural
6 bar by arguing that dismissal of the claim would be a miscarriage of justice.
7 *See* Opposition to Motions to Dismiss and for Partial Summary Judgment, pp. 16-17.
8 Bollinger points out that the Nevada Supreme Court rejected that argument. *See id.*;
9 *see also* Order of Affirmance, Exhibit 295, pp. 8-10. Bollinger argues that this ruling
10 was not an independent procedural ruling because it was interwoven with federal law, or
11 depended upon an examination of the underlying claim. *See* Opposition to Motions to
12 Dismiss and for Partial Summary Judgment, p. 16. Bollinger argues that, in ruling on
13 the issue whether there would be a miscarriage of justice if this claim was not
14 adjudicated on its merits, the Nevada Supreme Court "address[ed] the substance of the
15 evidence supporting Mr. Bollinger's federal claim that prior counsel was ineffective." *Id.*
16 at 17.

17 The assertion that the Nevada Supreme Court "addressed the substance of the
18 evidence" allegedly supporting the claim does not show that the procedural ruling was
19 interwoven with federal law, or that it depended upon an examination of the underlying
20 claim. The Nevada Supreme Court did not consider the merits of Claim 5. Rather, that
21 court addressed the issue whether there was a colorable showing that Bollinger is
22 actually innocent or ineligible for the death penalty. *See* Order of Affirmance, Exhibit
23 295, pp. 8-9. That court's analysis did not constitute consideration of the merits of
24 Claim 5.

25 Claim 5 is procedurally defaulted.

26 **iii. Claim 6**

27 In Claim 6, Bollinger claims that his constitutional rights were violated because
28 "the state post-conviction court, during its re-weighting analysis, failed to consider

1 mitigating evidence from the post-conviction proceedings.” Third Amended Petition, p.
2 120.

3 Bollinger argues that the Nevada Supreme Court’s ruling, that Bollinger did not
4 satisfy the prejudice part of the cause and prejudice standard necessary to overcome
5 the procedural default, was not independent of federal law. See Opposition to Motions
6 to Dismiss and for Partial Summary Judgment, pp. 17-18.

7 However, the Nevada Supreme Court’s ruling regarding this claim was clearly
8 based solely on procedural grounds. Although the Nevada Supreme Court discussed a
9 part of the merits of the claim — the issue of prejudice — that analysis was plainly for the
10 purpose of demonstrating that Bollinger could not overcome the procedural default by a
11 showing of cause and prejudice. The Nevada Supreme Court rested its decision,
12 affirming the dismissal of Bollinger’s claim, on independent state procedural grounds.
13 See *Moran v. McDaniel*, 80 F.3d 1261, 1269 (9th Cir.1996).

14 Claim 6 is procedurally defaulted.

15 **iv. Claim 12**

16 In Claim 12 of his third amended petition, Bollinger claims that his constitutional
17 rights were violated “due to the use of the unconstitutionally vague aggravating factor
18 that the murder was committed to avoid or prevent lawful arrest.” Third Amended
19 Petition, p. 149.

20 Bollinger argued in state court that “the failure to consider his claim that the
21 preventing-a-lawful-arrest aggravator is invalid resulted in a fundamental miscarriage of
22 justice because there was no evidence that he murdered the victims in an attempt to
23 avoid a lawful arrest.” Order of Affirmance, Exhibit 295, p. 9. The Nevada Supreme
24 Court rejected that miscarriage-of-justice argument, ruling as follows:

25 This court has already determined in its mandatory review of the death
26 sentence under NRS 177.055(2) that the evidence supported the finding
27 of the aggravating circumstances. [*Bollinger v. State*, 111 Nev. 1110,
28 1117, 901 P.2d 671, 676 (1995).] As it is the law of the case that sufficient
evidence was presented at trial for the jury to find that he had murdered
Rose to avoid a lawful arrest, see *Hall v. State*, 91 Nev. 314, 316, 535
P.2d 797, 799 (1975), Bollinger did not show that it was more likely than

1 not that no rational juror would have concluded that Rose's murder was
2 committed to prevent a lawful arrest.

3 *Id.*

4 Bollinger argues that this was not a default ruling "because it indicates only that
5 the Nevada Supreme Court previously considered and denied this claim on the merits
6 as part of its mandatory review of Mr. Bollinger's death sentence." See Opposition to
7 Motions to Dismiss and for Partial Summary Judgment, pp. 18-19. But this ruling by the
8 Nevada Supreme Court plainly was a default ruling; the Nevada Supreme Court was
9 clear that it was ruling on Bollinger's argument that dismissal of the claim would amount
10 to a fundamental miscarriage of justice. Order of Affirmance, Exhibit 295, p. 9. And,
11 looking back to its mandatory review of the death penalty on Bollinger's direct appeal,
12 the Nevada Supreme Court did not indicate that it had previously considered and
13 denied this claim — a claim that the preventing-a-lawful-arrest aggravator is
14 unconstitutionally vague. Rather, the Nevada Supreme Court indicated that it found, in
15 its mandatory review on the direct appeal, that the evidence supported the finding of the
16 preventing-a-lawful-arrest aggravator, a finding that was relevant to the miscarriage of
17 justice issue raised by Bollinger in attempting to overcome the procedural bar. Neither in
18 rejecting Bollinger's miscarriage of justice argument, nor in its mandatory review on
19 Bollinger's direct appeal, did the Nevada Supreme Court rule on the merits of this claim.
20 The state supreme court ruled that the claim was procedurally barred and that Bollinger
21 did not overcome the procedural bar.

22 Claim 12 is procedurally defaulted.

23 **v. Claim 14G**

24 In Claim 14G, Bollinger claims that his constitutional rights were violated because
25 the trial court did not instruct the jury "that it had to find the second element of death-
26 eligibility — that the aggravating circumstances were not outweighed by the mitigating
27 circumstances — beyond a reasonable doubt. . . ." Third Amended Petition, p. 162.

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1 The Nevada Supreme Court ruled as follows, with respect to Bollinger's
2 procedural default of this claim:

3 Bollinger argues that the district court erred by applying procedural bars to
4 his claim that the jury was not instructed to find that the aggravating
5 circumstances outweighed the mitigating circumstances beyond a
6 reasonable doubt. We conclude that this argument lacks merit. The
7 premise behind Bollinger's argument is that the jury's weighing function in
8 determining death eligibility is a factual determination that must be found
9 beyond a reasonable doubt, as explained in *Johnson v. State*, 119 Nev.
10 787, 59 P.3d 450 (2002), and appears to be based on *Apprendi v. New*
11 *Jersey*, 530 U.S. 466, 490 (2000) (holding that "[o]ther than the fact of a
12 prior conviction, any fact that increases the penalty for a crime beyond the
13 prescribed statutory maximum must be submitted to a jury, and proved
14 beyond a reasonable doubt"), *Ring v. Arizona*, 536 U.S. 584, 609 (2002)
15 (holding that capital sentencing scheme which places determination of
16 aggravating circumstances in hands of judge violates the Sixth
17 Amendment right to jury trial), and *Blakely v. Washington*, 542 U.S. 296,
18 303 (2004) (providing that "the 'statutory maximum' for *Apprendi* purposes
19 is the maximum sentence a judge may impose solely on the basis of the
20 facts reflected in the jury verdict or admitted by the defendant"). *Apprendi*
21 and *Ring* were decided several years before Bollinger filed the instant
22 post-conviction petition in 2005, and he wholly fails to explain his delay in
23 raising this claim. Further, this court held in *Colwell v. State*, 118 Nev. 807,
24 821, 59 P.3d 463, 473 (2002), that *Ring* has no retroactive application.
25 Therefore, the district court did not err in denying this claim as
26 procedurally barred.

27 Order of Affirmance, Exhibit 295, pp. 4-5 (emphasis removed).

28 Bollinger argues here that "[t]he Nevada Supreme Court addressed this claim on
the merits by holding that, in *Colwell v. State*, 59 P.3d 463 (Nev. 2002), it ruled that
under *Ring v. Arizona*, 536 U.S. 584, 609 (2002), *Apprendi* is not retroactive."
Opposition to Motions to Dismiss and for Partial Summary Judgment, p. 19. This
argument, however, is belied by the ruling of the Nevada Supreme Court, quoted above.
The Nevada Supreme Court ruled that "the district court did not err in denying this claim
as procedurally barred." This was a ruling regarding the procedural bar — a ruling that
there was no showing of good cause for Bollinger to fail to comply with the state
procedural rule.

Claim 14G is procedurally defaulted.

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1 **vi. Claims 1, 2, 7, and 11**

2 With respect to these claims in his third amended petition, Bollinger argues that
3 the Nevada Supreme Court ruled on the merits of the claims, and that, therefore, there
4 is no procedural default. Opposition to Motions to Dismiss and for Partial Summary
5 Judgment, pp. 19-20.

6 The Nevada Supreme Court's ruling that Bollinger refers to was as follows:

7 Bollinger argues that other errors amounted to a fundamental miscarriage
8 of justice: (1) his trial counsel proceeded under a conflict of interest, (2) his
9 appellate counsel proceeded under a conflict of interest, (3) the trial judge
10 was biased, (4) the district court lacked jurisdiction, (5) the jury failed to
11 designate a degree of murder, and (6) the district court denied him a
12 speedy trial. We conclude that these arguments lack merit. As stated
above, a fundamental miscarriage of justice requires a showing of actual,
factual innocence or ineligibility for the death penalty. *Mitchell v. State*,
122 Nev. 1269, 1273-74, 149 P.3d 33, 36 (2006); [*Pellegrini v. State*, 117
Nev. 860, 887, 34 P.3d 519, 537 (2001)]. This standard is a factual one
that is not met by merely alleging procedural errors at trial.

13 Order of Affirmance, Exhibit 295, pp. 10-11.

14 This ruling by the Nevada Supreme Court was plainly a ruling on Bollinger's
15 miscarriage of justice argument regarding the listed claims. This was not a ruling on the
16 merits of those claims. Bollinger's argument in this regard is without merit. Claims 1, 2,
17 7, and 11 are procedurally defaulted.

18 **F. Conclusion Regarding Procedural Default**

19 The Court, then, concludes that all the claims that Bollinger exhausted only in his
20 second state habeas action are barred by the doctrine of procedural default. This
21 applies to all of Claims 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14A, 14B, 14C, 14D, 14E,
22 14G, 15, 16, 17, all of Claim 18 except the claims that Bollinger's appellate counsel was
23 ineffective for failing to raise a claim that the trial court did not have jurisdiction and that
24 Bollinger's appellate counsel was ineffective for failing to raise a claim that the transfer
25 of Bollinger's case from Colorado to Nevada resulted in a violation of Bollinger's right to
26 a speedy trial, and all of Claim 19. As to those claims, respondents' motion to dismiss
27 will be granted, and those claims will be dismissed.

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1 The following claims, on the other hand, were exhausted in Bollinger's direct
 2 appeal or in his first state habeas action, and are not procedurally defaulted: Claim 14F,
 3 and Claim 18 to the extent it asserts claims that Bollinger's appellate counsel was
 4 ineffective for failing to raise a claim that the trial court did not have jurisdiction and that
 5 Bollinger's appellate counsel was ineffective for failing to raise a claim that the transfer
 6 of Bollinger's case from Colorado to Nevada resulted in a violation of Bollinger's right to
 7 a speedy trial. As to those claims, respondents' motion to dismiss will be denied.

8 **V. COGNIZABILITY OF CLAIMS**

9 Respondents argue that Claims 3, 4, 5E, 7, 8, 10, 14F, and 15 are not cognizable
 10 in this federal habeas action. See Motions to Dismiss and for Partial Summary
 11 Judgment, pp. 44-47. Much of respondents' argument in this regard goes to the merits
 12 of those claims. See *id.*

13 Claims 3, 4, 5E, 7, 8, 10, and 15 will be dismissed on the ground of the
 14 procedural default doctrine (see discussion, *supra*). The Court declines, therefore, to
 15 address respondents' arguments going to the cognizability and merits of those claims.
 16 This ruling is without prejudice to respondents reasserting such arguments at any
 17 appropriate time, if they deem it necessary to do so.

18 Respondents' argument with respect to the cognizability of Claim 14F is as
 19 follows:

20 Claim 14F fails to state a claim cognizable in habeas corpus. It challenges
 21 the reasonable doubt instruction. That instruction is constitutional.
Ramirez v. Hatcher 136 F.3d 1209, 1213-15 (9th Cir.1998).

22 Motions to Dismiss and for Partial Summary Judgment, p. 47; see *a/so* Reply in Support
 23 of Motions to Dismiss and for Partial Summary Judgment, p. 24. The merits of this claim
 24 will be better considered upon an answer by respondents, and further briefing as
 25 provided for in the scheduling order in this case. See Order entered April 3, 2012 (dkt.
 26 no. 154). The Court will, therefore, deny this portion of respondents' motion, without
 27 prejudice to respondents making this same argument regarding Claim 14F in their
 28 answer and in any further briefing on the merits of the claim.

1 **VI. WAIVER OF CLAIMS**

2 Respondents argue that Bollinger waived parts of Claims 1, 5, 7, and 8. Motions
3 to Dismiss and for Partial Summary Judgment, pp. 48-49; see *also* Reply in Support of
4 Motions to Dismiss and for Partial Summary Judgment, pp. 24-25. The claims that
5 respondents argue are waived are all claims that will be dismissed on the ground of the
6 procedural default doctrine. The Court declines, therefore, to address respondents'
7 arguments regarding the alleged waiver of those claims by Bollinger. This ruling is
8 without prejudice to respondents reasserting such arguments, at any appropriate time, if
9 they deem it necessary to do so.

10 It is therefore ordered that respondents' motion to dismiss (dkt. no. 215) is
11 granted in part and denied in part. The following claims in petitioner's third amended
12 habeas corpus petition (dkt. no. 168) are dismissed: all of Claims 1, 2, 3, 4, 5, 6, 7, 8, 9,
13 10, 11, 12, 13, 14A, 14B, 14C, 14D, 14E, 14G, 15, 16, 17, all of Claim 18 except the
14 claims that Bollinger's appellate counsel was ineffective for failing to raise a claim that
15 the trial court did not have jurisdiction and that Bollinger's appellate counsel was
16 ineffective for failing to raise a claim that the transfer of Bollinger's case from Colorado
17 to Nevada resulted in a violation of Bollinger's right to a speedy trial, and all of Claim 19.


18 It is further ordered that respondents' motion for summary judgment (dkt. no.
19 216) is denied.

20 It is further ordered that respondents shall file an answer within ninety (90) days
21 from the entry of this order, responding, on their merits, to the remaining claims in
22 petitioner's third amended habeas corpus petition (dkt. no. 168), which are Claim 14F,
23 and Claim 18 to the extent it asserts claims that Bollinger's appellate counsel was
24 ineffective for failing to raise a claim that the trial court did not have jurisdiction and that
25 Bollinger's appellate counsel was ineffective for failing to raise a claim that the transfer
26 of Bollinger's case from Colorado to Nevada resulted in a violation of Bollinger's right to
27 a speedy trial.

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1 It is further ordered that, in all other respects, the schedule for further
2 proceedings in this action shall be governed by the order entered by the Court on April
3 3, 2012 (dkt. no. 154).

4 DATED THIS 20th day of December 2013.

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8 MIRANDA M. DU
9 UNITED STATES DISTRICT JUDGE
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